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married woman, the wife of another man living at the time. If the marriage is not proved both of the man and woman, although the act be ever so clearly proved or confessed, it is but fornication whatever circumstances may attend it, founded only on the condition the man may occupy, and whether married or otherwise.

There is also some difference of opinion, or confusion in expressing it, how far a grand jury must be satisfied by the evidence, in order to find a bill; some holding that it is sufficient if twelve or more of the jury believe there is a sufficient amount of evidence to put the defendant upon trial; in other words, that there is a probability that the crime was committed; others maintaining that the grand jury should be convinced to the same extent that would justify the petit jury in returning a verdict of guilty. Twelve or more of the jury should be satisfied by the proof that the defendant was guilty of the offence charged, not however beyond a reasonable doubt—the weighing of doubts belongs to the traverse jury alone—after all evidence on both sides is heard. The mode of proof before a jury also may be different. It is not expected that they should discuss nice points of the legality of the testimony, and may, as we think, find a bill on evidence which might not be admissible before a traverse jury at all; for example, reputation and co-habitation might be sufficient proof of a marriage with a grand jury in cases where that medium of proof would be rejected on the trial.

RECENT AMERICAN DECISIONS.

In the Supreme Court of Ohio—January Term, 1855.

THE MILAN AND RICHLAND PLANK ROAD COMPANY vs. EDWARD E.
HUSTED, TREASURER OF HURON COUNTY.

1. That the legislature of Ohio has no constitutional authority, when conferring special privileges on a corporation, to abridge or relinquish to any extent, or in any manner whatsoever, by contract or otherwise, any portion of the power of taxation over its corporate property, has been settled by solemn adjudication, and is not now an open question in this State.

2. The ninth section of the charter of this corporation, which specially provides, that, in consideration of the expenditures which the company will necessarily have to incur in making and keeping up its plank road, the property of the corporation of every kind *shall be forever exempt from taxation*, must be construed with reference to the constitutional powers of the legislature, and *as operative* only to exempt the company from taxation under the authority of any law existing at the time the act of incorporation was passed, but as *wholly inoperative* as against any subsequent law imposing a tax upon the company.
3. A law being an imperative rule of action prescribed by the supreme power of the government from the paramount considerations of the public interests, cannot in its nature, be a *contract*, inasmuch as it is of the essence of a contract, that it be an agreement between two competent parties upon a mutual consideration, and in relation to a matter which is the legitimate subject matter of bargain or sale.
4. There is a plain distinction between a *law* authorizing a contract to be made and a *contract* made under its authority. And where a contract is made pursuant to the authority or direction of a statute, for the transfer of property or the performance of services, a vested right may be created, and where this is the case, the repeal or amendment of the law would leave the obligations of the contract still existing and unimpaired.
5. The legislative or law making power comprehends full control over existing laws by amendment or repeal, as well as the power of enacting new laws.
6. This high trust of civil authority must, under the constitution of this state, continue in full force, and complete in its operation, at every session of the legislature, and the general assembly cannot, by contract or otherwise, at one session impose any restraint, limitation or abridgment on the exercise of the legislative power at any subsequent session; nor can this body, in the enactment of a law, provide by *contract* or *otherwise* against its amendment or repeal at a subsequent session.

This is a petition in error to reverse the judgment of the Common Pleas of Huron county. The plaintiff in error having refused to pay the taxes assessed upon the property of the corporation, for state and county purposes for the year 1852, Edward E. Husted, as the treasurer of Huron county, instituted proceedings in the Court of Common Pleas, by *scire facias*, pursuant to a statute of this State, in order to enforce the collection of the taxes so assessed. To this proceeding, the plaintiff in error plead specially, that, by virtue of the act of the general assembly of the state of Ohio, incorporating the company, it was expressly provided and agreed, that, in consideration of the construction of its plank road by the company, no assess-

ment or tax should ever be levied or collected against said company, and that the company, having organized and constructed its plank road under this law, was exempt from the assessment of the tax sought to be enforced, &c. To this plea a demurrer was interposed. The Court of Common Pleas sustained the demurrer, and rendered judgment against the corporation for the amount of the taxes, together with the interest and penalty thereon, which judgment the plaintiff in error now seeks to reverse.

It appears that, the Milan and Richland Plank Road Company was duly incorporated by a statute, passed by the legislature of this State, February 19, 1845. Ohio Laws, vol. 43, 111. The act of incorporation confers the usual privileges exercised by corporations of this description, authorizes the company to enter upon and take and use the necessary land, materials, &c., for the purposes of its road, and to erect toll gates on the road when completed, and to exact the payment of such an amount of toll, by persons using the road, as the directors may in their discretion prescribe. And the 9th section of the act of incorporation, is in the words following, to wit:

“That in consideration of the expenses which said company will necessarily incur in constructing said road, with the appurtenances thereof, and in keeping the same in repairs, the said road and its appurtenances, together with all tolls and profits arising therefrom, are hereby vested in said corporation, and the same shall be forever exempt from any tax, imposition or assessment whatever.”

The law under which the taxes in question were assessed on the property of the plaintiff in error, was enacted May 2, 1852, and requires the property of all persons, including corporations, in this State, to be taxed equally, and at its actual value in money.

J. R. Osborn and E. B. Sadler, Attorneys for plaintiff.

A. S. Curtis, Attorney for defendant.

The opinion of the court was delivered by

BARTLEY, J.—The plaintiff in error claims an absolute and perpetual exemption from taxation, upon the alleged ground, that the law incorporating the company is a contract between the State and the corporation, containing a stipulation in express terms, *that the*

corporation should be forever exempt from taxation. This was the defence relied upon as a bar to the action in the court below, and upon the ground that it was overruled by the court, the plaintiff in error seeks to reverse the judgment. The question presented by the case is twofold in its character, involving the question whether the act incorporating the company is exempt from the legislative power of amendment, and the corporation exempt from the legislative control over the right of taxation. Inasmuch as the charter provides, in express terms, for a perpetual exemption from taxation, the corporation can be made liable to taxation only by legislation having the effect to amend the law creating it, by repealing the exemption.

The legislative or law-making power of the government necessarily comprehends the power of amending and repealing existing laws, as well as the power of making new laws. And as the right of taxation is included in the legislative power, it can be exercised only through legislative action, and by the authority of law.

The legislative power is the vital function which animates, directs, and controls the whole operation of civil authority. When it is conferred by the constitution *in general terms*, it extends to every legitimate purpose of legislation pertaining to civil government, subject *only* to such limitations as are expressly provided in the constitution. And the power of taxation, a most important means employed by the legislative power, is as essential to the continued existence of civil government as the circulation of the blood is to the human system. This sovereign attribute of civil power, in accordance with the terms by which it has been vested in the government of this State, cannot in any manner, nor to any extent whatever, be limited, abridged or surrendered by contract or sale, to any person or association of persons.

The plaintiff in error derived the usual powers of a corporation from the law of its creation, including the important authority to take lands, materials, &c., the subjects of private property, belonging to other persons, and appropriate the same to the purposes of its plank road, and also the very liberal authority to charge any rate of toll for the use of its road, which the directors might, in their

discretion, prescribe. If upon the terms, and in the exercise of these powers, the corporation had not sufficient inducement to construct its road, it was not competent for the legislature, by way of *contract*, and in consideration that the company would exercise the powers given it and construct its road, to surrender the constitutional power of taxation over it. The constitution of the State does not clothe the General Assembly with the authority to surrender, or part with any portion whatever of the taxing power by contract or sale. No relinquishment or limitation of any part of the power of taxation, can in any form, or to any extent whatsoever, be made the consideration of a contract.

This power is a delegated trust of sovereignty, which from its very *nature and object*, must remain perfect and in full operation at every session of the legislature, and it cannot be restricted, abridged, or to any extent surrendered by private contract. That the legislature of this State has not the constitutional authority, in conferring special privileges on a corporation, to abridge to any extent, or in any manner whatever surrender by contract any portion of the right of taxation over it, has been settled by solemn adjudication, and is not now an open question in this State. *Debolt vs. The Ohio Life Insurance and Trust Company*, 1 Ohio S. R., 564; *Toledo Bank vs. The City of Toledo*, Ibid, 628.

This is decisive of this case, and upon this ground the judgment of the Common Pleas must be affirmed. This is as far as some of the members of the court deem it necessary to go. But in expressing the views of a majority of the court at least, I am warranted in going further.

By the first section of the second article of the constitution, the legislative power of the State is vested *in general terms*, in the General Assembly. This most important and comprehensive of all the powers of government, being that in which the supremacy of the government itself consists, must continue in full force and undiminished. The power of enacting laws necessarily comprehending full power to amend and repeal existing laws, if full control over existing did not exist, the legislative power would be imperfect, and incompetent to the complete performance of its high functions. The

legislature cannot at one session, by the enactment of a law, in any manner, or to any extent whatsoever, limit or abridge the legislative power vested by the constitution in this body, at any subsequent session. There is no provision of the constitution which enables the General Assembly in the enactment of a law, to provide by *contract* or *otherwise* against its amendment or repeal. If this could be done, the sovereign power of legislation itself could be abridged by contract, for the legislative power must be as ample and complete in its capacity to alter and repeal existing laws, as it is in the power of the enactment of new laws. If a law could in its nature be a contract, it would be subject to the unavoidable condition of amendment and repeal by the legislative power of the State. But a law and a contract are two things essentially different in their nature. A law is a rule of action prescribed by the supreme power in a State, which all persons within the sphere of its operations are bound to obey. 1 Blackstone's Com., 40. A law is an enactment proceeding from the supreme power in the government, in consideration of the public interests. The enactment of a law cannot be procured by contract. There is no provision in the constitution of Ohio allowing any person or set of persons to purchase, or procure the enactment of a law, by contract. The exercise of the legislative power cannot be made the subject of barter or sale. This highest function of civil authority acts solely and alone from the overruling and paramount considerations of the public interests. If the enactment of laws could be procured by purchase or contract, the public interests would often be sacrificed to the corrupting considerations of special and private interests. A law then, from its inherent nature, cannot be a contract; on the contrary, it is a rule of action prescribed by the supreme civil power, solely and alone from the paramount consideration of the public interests. A contract is essentially different and distinct. It is an agreement between two competent parties, upon a mutual and legal consideration, and in relation to a *matter* which is the legitimate subject of bargain or sale.

Although a law cannot in its nature constitute a contract, yet it may authorize the making of a contract. Contracts to which the State is a party, are usually made under the authority of some ex-

isting law, and in conformity to its directions. But there is a plain distinction between the law itself, and the contract entered into under its authority. Where a contract is entered into pursuant to the authority of a law, for the transfer of property or the performance of services, a vested right may be created separate and distinct from the law itself, so that, even if the law be subsequently amended or repealed, the obligations of the contract or the vested rights created, remain unimpaired. The repeal or amendment would be *prospective*, not *retroactive* in its operation, and therefore, not operative against the authority by which the contract was made. The distinction between a law and a contract made under its authority, is one which has been recognized by the Supreme Court of the United States, and recently sanctioned by the Supreme Court of Ohio, *Fletcher vs. Peck*, 9 Cranch, 87; *The Charles River Bridge vs. The Warren Bridge*, 11 Peters, 530; *The Bank of Toledo vs. Bond et al.* 1 Ohio State R., 640.

The doctrine, however, that the charter of a private corporation is a contract, rests upon the ground, that *the law itself* under which the company organizes and acts as a legal person, *is a contract* creating an exemption from the legislative power of amendment and repeal, and *this* by implication and without express provision to that effect! This absurd doctrine has been promulgated as law in this country for a number of years, to sustain certain views of public policy, and the whole doctrine is founded on the authority of the decision of Supreme Court of the United States, in the case of *The Dartmouth College vs. Woodward*, 4 Wheat., 518, which, upon close examination, is found not to sustain it. The gross absurdity of this doctrine, and the authority which gave rise to it, is fully examined in the opinion of this court in the cases of *The Toledo Bank vs. The City of Toledo*, 1 Ohio S. R., 640; *Knoup vs. The Piqua Bank*, Ibid, 604; and *Mechanics and Traders Bank vs. Debolt*, Ibid, 592.

In the case of the *West River Bridge Company vs. Dix et al.* 6 How., 530, the Supreme Court of the United States held, that *the right of eminent domain*, one of the sovereign attributes of government, and essential to its preservation, and the proper performance

of its functions, is paramount to the rights of private property, and that not only the property, but the franchise of a corporation was held subject to its exercise. The right of *eminent domain* is certainly not any more important and essential to the existence of government and the proper exercise of its powers, than the right of taxation, or the right of legislative control over existing laws by amendment and repeal. The essential functions of sovereignty are inherent in every distinct political community, which are necessary to guard its own existence, and to protect and promote the public interests. The exercise of these highest acts of sovereignty relate not only to the external relations of government, but extend to the interior polity and relations of social life, and must be regulated with reference to the public interests and advantage of the whole community. And all private rights must be held as subordinate and subject to the control of these indispensable functions of civil authority. This does not affect the inviolability of private property. The obligations of contracts, and indeed, all rights of private property, rest upon those incidental or implied conditions, which are superinduced by the pre-existing and higher authority of the laws of nature, of nations, and of the community in which they exist. The right of taxation and the right of legislative control over existing laws by amendment and repeal, as well as the right of *eminent domain*, are high trusts of delegated sovereign authority, which the mere agents authorized to administer them, have no power to abridge or surrender to any extent whatever. That the legislative power may sometimes select its objects for taxation, and within its constitutional powers, provide a total or a partial exemption from taxation for property of any particular kind, or the property of any particular persons, does not affect the question, provided such laws remain subject to amendment and repeal. The taxing *power* is not abridged or surrendered, so long as it is subject to legislative control. But if the legislature can pass a law, and provide by contract against its amendment or repeal at any subsequent session, it can surrender or relinquish a portion of the legislative power. And if the legislature can by the enactment of a law, provide a perpetual and irrevocable exemption from taxation, it can virtually relinquish the taxing power

for the benefit of those in whose favor the exemption is provided. If the taxing power can be thus irretrievably relinquished for the benefit of corporations, the same thing can be done for the benefit of natural persons, and if it can be done for the few, it can be done for the many. If the legislature can enact laws for the benefit of corporations, and by contract surrender the legislative control over them, by amendment and repeal, it can do the same thing for the benefit of natural persons. And if this can be done for a few favored persons, it can be done for the many. Thus the sovereign powers of legislation and taxation could be surrendered or impaired so as to destroy their efficiency to sustain the government, without the power of subsequent legislation to remove the difficulty by amending or repealing the laws. It was never intended by the constitution that these high trusts of civil power should be thus liable to be crippled and stripped of their efficiency and usefulness. It never was intended that the legislature should be clothed with the authority to surrender the powers, or any portion of them which are essential for the preservation of the government itself. One of the great objects of a written constitution, is to provide against legislative discretion, which may lead to abuses, and ultimately to the destruction of the government. The legislative power of the State, therefore, which is by the constitution vested in the General Assembly, must continue in full force and virtue at each succeeding session of that body, and remain wholly unimpaired by contract or other provision for its surrender or limitation, made at any preceding session of that body.

The ninth section of the charter of this company, providing the exemption from taxation, was operative to protect the company from taxation under the authority of any statute existing at the time the act of incorporation was passed, and until the legislature should otherwise provide. But notwithstanding this exemption would seem to be perpetual in its terms, it must be construed with reference to the constitutional powers of the body which enacted it, and therefore as perpetual only as against tax laws existing at the time of its passage, but as wholly *inoperative* as against any subsequent laws which might be thereafter enacted, imposing a tax on the corporation.

Judgment of the Court of Common Pleas affirmed.